call, he placed the bet (2 R. 35–39). The next morning, petitioner telephoned Warrens and told him the wager had been lost because Warrens had misunderstood his betting directions (2 R. 40).

Later that month, petitioner notified Warrens that his contact at the track would be willing to cooperate "only once more," but that this time they should increase the bet to insure recovery of their previous losses (2 R. 41–42). Warrens gave petitioner $14,000 as his investment in the wager (2 R. 41–43, 46, 47). On March 11, 1963, petitioner and Warrens located two public phone booths, side by side (2 R. 44). Petitioner entered one, and purportedly telephoned his race track contact, and Warrens used the other to telephone Las Vegas. While Warrens had "Mellon" on the telephone (2 R. 44–45), petitioner, carrying a piece of paper with horses and race numbers listed on it, pointed to horse number 7, "Arrow something." Warrens conveyed this information to Mellon and told him to place a bet of $20,000 (2 R. 46). About fifteen minutes later, "Mellon" telephoned again and told Warrens that "the horse came in out of the money" and then "Hung up" (2 R. 48). Petitioner, on being told of this development, made a telephone call and related to Warrens that he had telephoned "Mellon" and told him that "he had to do something to make this good" (2 R. 48–49).

A day or two later, petitioner told Warrens that the only way that he could get "Mellon" to agree to change the bet to a winning horse was to put up another $10,000, thus raising the bet to $30,000, with

"Mellon" sharing in the proceeds of their winnings (2 R. 49). Warrens contacted a friend (Dave Williams), explained that there had been a "mixup" on a bet and that he needed money for a short time to make an additional deposit so that the bet would be honored (2 R. 50–52). By prearrangement, Williams delivered $9,000 of his own money to petitioner (3 R. 305–313). On a number of occasions in the next few days both petitioner and "Mellon" telephoned Warrens, putting him off in regard to this additional money and the bet (2 R. 56–60).

2. After Williams had learned the nature of Warrens' prior dealings with petitioner, he persuaded Warrens to go to the San Diego police on March 22 (2 R. 62). On learning that Warrens had an appointment with petitioner that afternoon, the police equipped him with a small electronic transmitter (concealed in his inner coat pocket) which would broadcast to receiving and recording equipment to be installed in a police truck stationed nearby (2 R. 62–64, 76–77). Williams also attended the meeting. Warrens, Williams and Sergeant Thompson (who had received and recorded the conversation (2 R. 67, 77)) testified to what occurred.[4] Petitioner acknowledged receipt of the $9,000 and of the other monies previously given to him by Warrens and explained that he and Warrens had been involved in a "past-posting scheme." He said that he had utilized his contacts in further-

[4] The recording itself was not admitted because the judge believed some of the conversation to be irrelevant and prejudicial (3 R. 392; 5 R. 651, 661, 805).

ance of these arrangements, and that he hoped to get the money back. When Williams indicated that he had doubts that a bet had ever been made and that he intended to go to Las Vegas to investigate, petitioner refused to divulge the names of his contacts and attempted to dissuade Williams from making the trip (2 R. 88–92; 3 R. 280–284, 318–326).

During the two weeks following March 22, petitioner telephoned Warrens on numerous occasions and assured him that he had spoken to "Mellon" and was trying to get the money back (2 R. 87). At no time, however, was any of the money returned (2 R. 92, 114).

ARGUMENT

1. There is no merit to petitioner's contention that it was error to permit Sergeant Thompson to testify to the March 22 conversation among petitioner, Warrens, and Williams, which the sergeant overheard by means of a transmitting device carried by Warrens.[5] The admissibility of such testimony was established by *Lopez* v. *United States*, 373 U.S. 427.[6] Petitioner, moreover, did not interpose an objection to this testi-

[5] Although petitioner states otherwise (Pet. 3, 7, 17), the record shows that the tape recording of the conversation was neither played before the jury nor introduced into evidence (See 3 R. 392; 5 R. 651, 666, 805).

[6] We note that, as in *Lopez*, the testimony here of the conversation as overheard through the transmitting device was not the exclusive testimony offered regarding the conversation but was in addition to the testimony of Warrens and Williams, who participated in the interview with petitioner. See the concurring opinion of the Chief Justice in *Lopez*, 373 U.S. at 441–446.

mony at trial based upon the means by which Sergeant Thompson overheard the conversation.

The assertion (Pet. 14–17) that testimony as to the conversation was inadmissible because counsel was not present at the meeting between petitioner, Warrens, and Williams is frivolous. The conversation did not occur after the return of an indictment, as in *Massiah* v. *United States*, 377 U.S. 201, or after arrest, as in *Escobedo* v. *Illinois*, 378 U.S. 478. On the contrary, the conversation took place in petitioner's motel room at the first stage of police investigation of the case following the complaint made by Warrens and Williams. The criminal scheme was, moreover, still unfolding. During the two-week period following the meeting at the motel room where the conversation took place petitioner telephoned Warrens "numerous times" concerning the bets to "reassure" him that he had spoken to "Mellon" and that things would be all right (2 R. 87–88). The Constitution does not require that a defendant be permitted to confer with counsel while he is participating in criminal conduct. See *Vinyard* v. *United States*, 335 F. 2d 176, 184 (C.A. 8), certiorari denied, 379 U.S. 930.

2. Codefendant Tenner took the stand in his own behalf and admitted that he had used the name "Henry Mellon" and that he had had a telephone answering service in Las Vegas (5 R. 613). Tenner's testimony was impeached by reference to his contrary grand jury testimony (5 R. 631–637). Before testifying before the grand jury, Tenner had been advised that he was under oath and that he was subject to

prosecution if he testified falsely. It had also been determined that he knew of his privilege against self-incrimination. The United States Attorney who conducted the grand jury inquiry had, in addition, communicated with an attorney representing Tenner prior to his grand jury appearance (5 R. 642, 646–647, 667–668).

There was therefore no violation of Tenner's rights before the grand jury. Petitioner would not, in any event, have standing to complain of any such violation. In addition, the grand jury testimony did not affect petitioner's case, since the inconsistent answers related exclusively to Tenner's credibility and participation in the scheme. The trial court made clear in its instructions that any impeachment through prior inconsistent testimony should be considered only in determining the weight to be given to the testimony of the particular witness involved (5 R. 807–808).

3. After Williams testified for the government as to the contents of his conversation with petitioner and Warrens (3 R. 318–326), he stated, on cross-examination, that, on the day before his testimony, he had read a partial memorandum prepared from the tape recording of the conversation to refresh his recollection (3 R. 329, 331). The trial court denied the defense motion to have the government produce this document for use on cross-examination of the witness on the ground that the defense "had an opportunity on two occasions to hear the tape recording in full" (3 R. 330). The record corroborates that, shortly

before and during the trial, defense counsel was permitted to hear the recording in full (2 R. 4–9, 67–69). While it is not entirely clear, the record also suggests that, at the outset of the trial, defense counsel had in fact been given an opportunity to examine the memorandum (2 R. 7–b).

The memorandum sought by the defense was not a "statement" of government witness Williams producible under 18 U.S.C. 3500, since it was a partial record of the meeting, reproduced at a later date, and was never "signed or otherwise adopted or approved by" Williams. See 18 U.S.C. 3500(e) (1) (2). The only material in the government's possession which could qualify as Williams' "statement" regarding the conversation was the tape recording itself. Since defense counsel heard this recording on two separate occasions, the trial judge properly ruled that he had obtained the only statement that the defense might be entitled to under 18 U.S.C. 3500.

Nor was production of the memorandum required under the special rule dealing with material used by a witness to refresh recollection. Williams did not use the memorandum at trial, but referred to it the day before his testimony. Its production was therefore a matter within the sound discretion of the trial judge. *Goldman* v. *United States,* 316 U.S. 129, 132; *Needelman* v. *United States,* 261 F. 2d 802, 806 (C.A. 5), certiorari dismissed as improvidently granted, 362 U.S. 600. Since three separate accounts of the conversation were offered by the government at the trial, and since the actual tape recording was made avail-

able to the defense, the court did not abuse its discretion in light of the danger of injecting confusing collateral issues into the case through cross-examination of Williams on the basis of this partial transcript. Cf. *Michelson* v. *United States*, 335 U.S. 469, 480.

4. The court of appeals reversed petitioner's conviction on counts 3-6 on the ground that there was no showing that petitioner was connected with telephone calls made by Tenner to Warrens in May and June, 1963, a considerable period after the events on which counts one and two were based (1 R. 151). Such reversal obviously did not require reversal as to counts one and two. The government's proof clearly segregated counts one and two, in which petitioner was overtly and directly involved, from the remaining counts which dealt with the overt activities of only defendant Tenner. Any possibility of prejudice was removed by the trial court's explicit instructions to the jury (5 R. 813) that

> Each offense and the evidence applicable thereto should be considered separately. The fact that you may find both or one of the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any other offense charged.'

'Petitioner sets forth as a "Question Presented" (Pet. 4) but does not argue that government counsel's reference in closing argument to him as "Johnny B," was unfair comment which denied him "a fair trial and due process" (Pet. 4). The complete answer is that a government witness had in fact testified he had known petitioner as "Johnny B" (4 R. 550-551). Government counsel's statement to that effect was therefore a fair reference to the evidence (See 5 R. 725, 779; see also 2 R. 28).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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